

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:13-CR-74-2BR
No. 7:14-CV-202-BR

JORGE ERNESTO TINOCO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER

This matter is before the court on the government's motion to dismiss petitioner's 28 U.S.C. § 2255 motion. (DE # 98.) The government contends that all of petitioner's claims should be dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The government submitted in support of the motion an affidavit and a letter from petitioner's trial counsel. The court cannot consider that affidavit and letter unless it converts the motion to one for summary judgment under Rule 56, and it cannot do so without notice to petitioner. See Fed. R. Civ. P. 12(d).

The court concludes that conversion of the motion is warranted. Accordingly, the court advises petitioner that it intends to construe the government's motion to dismiss as one seeking summary judgment under Rule 56 and will consider the exhibits attached to the government's memorandum in support of its motion. Petitioner is further advised that he should respond to the government's motion with affidavits, declarations, citations to particular parts of the record, or other material in such a manner so as to persuade this court that a genuine issue of material fact remains to be determined and that the case should proceed to evidentiary hearing. Petitioner

shall file his response to the motion within thirty days.¹ The government may file a reply, if any, within fourteen days thereafter.

This 11 February 2015.



W. Earl Britt
Senior U.S. District Judge

¹ Petitioner filed a response to the motion, (DE # 101), but it is not sworn or declared, certified, verified, or stated as true under penalty of perjury.